

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL E. ELLER

Petitioner,

v.

LUIS SPENCER, Superintendent,

Respondent.

Civil Action No. 05-10740-DPW

**MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENT'S MOTION TO DISMISS PETITION
FOR WRIT OF HABEAS CORPUS**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the respondent, Luis Spencer, respectfully submits this motion to dismiss the petition for writ of habeas corpus filed by the petitioner, Michael E. Eller, on the grounds that the petition fails to state a claim upon which relief may be granted.¹ As grounds for this motion, and as set forth more fully herein, the petition for a writ of habeas corpus may not be granted because the petitioner has failed to exhaust the claims stated in his petition for a writ of habeas corpus, i.e., he has failed to present his claims to the state's highest court before bringing them in federal court. Specifically, the petitioner never presented either the claims he now advances to the Massachusetts Supreme Judicial Court ("the SJC"). Because the petitioner has not yet provided the state's highest court with the first opportunity to pass on the merits of these claims, the petition should be dismissed.

¹ In the event that this Court declines to dismiss the petition on the grounds set forth in this memorandum, the respondent reserved the right, and requests the opportunity, to address the merits of the claim in this petition.

28 U.S.C. § 2254(b)-(c); *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

BACKGROUND

Prior Proceedings

On February 20, 2002, the petitioner appeared in the Massachusetts Superior Court for Berkshire County to plead not guilty to charges of (1) violation of the statute prohibiting possession of a firearm by a person previously convicted with a violent crime/drug offense; (2) possession of a dangerous weapon with a large capacity and/or a feeding device without a valid license; (3) possession with intent to distribute of a Class A substance, second or subsequent offense; (4) trafficking in a controlled substance weighing 14-27 grams; (5) three separate counts of possession with intent to distribute of a Class B substance, second or subsequent offense; (6) possession of firearm without a valid identification card; and (7) use of a firearm in commission of a felony. *See* Docket Sheet for *Commonwealth v. Michael E. Eller*, Berkshire County Superior Court No. BECR2002-00028, attached hereto as Exhibit A (hereinafter, “Docket Sheet”), pp. 3, 9. On March 6, 2003, after a jury-waived trial before Justice Curley, the petitioner was found guilty of all of the charges against him other than one of the charges of distribution/manufacturing of a Class B substance, second or subsequent offense. *See id.*, pp. 7-9. The petitioner was sentenced to a term of years in the state prison.²

On March 12, 2003, the petitioner filed a notice of appeal of the verdict. *See* Docket Sheet, p. 8. On April 27, 2005, Notice of Assembly of the record was mailed to the Appeals Court. *See id.*, p. 9; *see also* Notice of Assembly of the Record, attached hereto as Exhibit B.

² The details of the petitioner’s sentence are not set forth here as they are not relevant to the respondent’s argument on the issue of exhaustion.

The petitioner's appeal is now pending in the Massachusetts Appeals Court. *See* Appeals Court of Massachusetts Case Docket Sheet for *Commonwealth v. Michael Eller*, 2005-P-0632, attached hereto as Exhibit C.

The Instant Federal Habeas Petition

The petitioner filed his habeas petition in this Court on or about April 8, 2005. In his petition, the petitioner asserts that his constitutional rights had been violated by the failure of the Commonwealth to provide him with the transcripts of his trial (and motion to suppress hearing) so that he could proceed with his appeal.

ARGUMENT

The instant habeas petition should be denied because the petitioner has failed to exhaust his state court remedies.

A. Standard

It is well established that "a federal court should not consider questions posed in a habeas petition until the 'power of the highest state court in respect to such questions' has been exhausted." *Mele v. Fitchburg District Court*, 850 F.2d 817, 819 (1st Cir. 1988), *quoting United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17 (1925). *See also Rose v. Lundy*, 455 U.S. 509, 518-19 (1982); *Adelson v. DiPaola*, 131 F.3d 259, 261-62 (1st Cir. 1997); *Dougan v. Ponte*, 727 F.2d 199, 202 (1st Cir. 1984); 28 U.S.C. § 2254(b)(1)(A). The longstanding exhaustion requirement³, in addition to ensuring that state courts have the first opportunity to correct their

³ The exhaustion requirement is codified at 28 U.S.C. §§ 2254(b) and (c), which preclude federal habeas review unless "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). *See also Mele v. Fitchburg Dist. Ct.*, 850 F.2d 817, 819 (1st Cir. 1988).

own constitutional errors made in their proceedings, enables federal courts to accord appropriate respect to the sovereignty of the states and promotes comity by “minimiz[ing] friction between our federal and state systems of justice.” *Rose*, 455 U.S. at 518. *See also Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *Ex parte Royall*, 117 U.S. 241, 251 (1886)(state and federal courts are “equally bound to guard and protect rights secured by the Constitution”); *Scarpa v. DuBois*, 38 F.3d 1, 6 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1984); *Mele*, 850 F.2d at 819.

It is the petitioner’s heavy burden to demonstrate that his any federal errors in the state court proceedings were fairly presented to the state’s highest court. *Nadworny v. Fair*, 872 F.2d 1093, 1098 (1st Cir. 1989). In order to present a claim sufficiently for exhaustion purposes, “a petitioner must inform the state court of *both* the factual and legal underpinnings of the claim.” *Scarpa*, 38 F.3d at 6 (emphasis added). The theory that the petitioner advances in his habeas petition must be the same as that relied upon in his presentation to the highest state court. *Gagne v. Fair*, 835 F.2d 6, 7 (1st Cir. 1987).

Moreover, every claim in a federal habeas petition must have been exhausted. *Rose*, 455 U.S. at 518-19. If a petition is “mixed” -- that is, contains both exhausted and unexhausted claims, it must be dismissed. *Id.*

B. The Petitioner Cannot State an Actionable Claim for a Writ of Habeas Corpus, Since He Has Not First Presented His Claims to the Massachusetts Supreme Judicial Court.

The petitioner’s petition must be dismissed because he has not presented the claims he now asserts before the SJC before bringing them to this federal court for review. The record is clear that the transcripts necessary for the state court appeal have been assembled and that Notice

of Assembly of the Record has been sent to the Appeals Court and to the petitioner, in accordance with Massachusetts practice. *See* Exhibits B and C. The appeal has been entered in the Massachusetts Appeals Court. *See* Exhibit C. The petitioner should, therefore, be required to exhaust his claims in the Massachusetts Appeals Court and then in the SJC before he is permitted to proceed on his habeas claim.⁴ *See Mele*, 850 F.2d at 820. Until the petitioner has brought his claims to the SJC and has thereby exhausted them, his is not entitled to habeas relief and his petition must be dismissed. *See Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988)(“[F]ederal habeas oversight is not a freewheeling construct. It is dependent, among other things, upon all the claims asserted in the petition having been exhausted in the state courts”). *See also Rose*, 455 U.S. at 510, 518-19; *Picard*, 404 U.S. at 275 (“It would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation”)(quoting *Darr v. Buford*, 339 U.S. 200, 204 (1950)).

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that this Court dismiss this habeas petition on the grounds that it contains unexhausted claims.

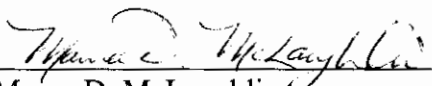
⁴ Since the petitioner’s claim is that he was being prevented from pursuing a state court appeal because he was not provided with the necessary transcripts, the preparation of the transcripts and assembly of the record has rendered his habeas claim moot. Moreover, any claimed violation of his constitutional rights may be pursued on appeal or on a habeas claim after his state court remedies have been exhausted.

Respectfully submitted,

LUIS SPENCER,

By his attorneys,

THOMAS F. REILLY
ATTORNEY GENERAL


Maura D. McLaughlin
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2857
BBO No. 634923

Dated: May 11, 2005

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2005, I caused a copy of the above document to be served by first-class mail, postage prepaid, upon the *pro se* petitioner, Michael E. Eller, MCI-Norfolk, P.O. Box 43, Norfolk, Massachusetts 02056.

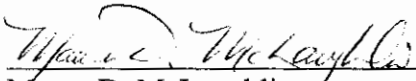

Maura D. McLaughlin

EXHIBIT A

**Commonwealth of Massachusetts
BERKSHIRE SUPERIOR COURT
Case Summary
Criminal Docket**

Commonwealth v Eller, Michael E

Details for Docket: BECR2002-00028

Case Information

Docket Number:	BECR2002-00028	Caption:	Commonwealth v Eller, Michael E
Entry Date:	02/14/2002	Case Status:	Criminal 1- CtRm 1
Status Date:	03/12/2003	Session:	Disposed (appeal pending)
Lead Case:	NA	Deadline Status:	Deadline act
Trial Deadline:	03/01/2002	Jury Trial:	YES

Parties Involved

2 Parties Involved in Docket: BECR2002-00028

Party Involved:		Role:	Defendant
Last Name:	Eller	First Name:	Michael E
Address:	49 Arnold Place	Address:	
City:	North Adams	State:	MA
Zip Code:	01247	Zip Ext:	
Telephone:			

Party Involved:		Role:	Plaintiff
Last Name:	Commonwealth	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			

Attorneys Involved

4 Attorneys Involved for Docket: BECR2002-00028

**Attorney
Involved:**

Last Name: Sheldon
Address: 139 North Street
City: Pittsfield
Zip Code: 01201
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Fascimile: 413-443-9342

Firm Name:

MA146

First Name: Jill A
Address: Suite 202
State: MA
Zip Ext: 5101
Tel Ext:
Representing: Eller, Michael E (Defendant)

**Attorney
Involved:**

Last Name: Allen
Address: 1145 Main Street
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Zip Code: 01103
Telephone: 413-734-0100
Fascimile: 413-734-0180

Firm Name:

HEIS01

First Name: Bonnie G
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Zip Ext:
Tel Ext:
Representing: Eller, Michael E (Defendant)

**Attorney
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Firm Name:

BERK03

First Name: David F
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Zip Ext:
Tel Ext:
Representing:

**Attorney
Involved:**

Last Name: Graham Jr
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City: Hampden
Zip Code: 01036
Telephone: 413-781-4342
Fascimile: 413-566-0163

Firm Name:

GRAH02

First Name: Stewart T
Address:
State: MA
Zip Ext:
Tel Ext:
Representing: Eller, Michael E (Defendant)

Calendar Events

10 Calendar Events for Docket: BECR2002-00028

No.	Event Date:	Event Time:	Calendar Event:	SES:	Event Status:
1	02/20/2002	14:00	Arraignment	1	Event held as scheduled
2	08/12/2002	14:00	Hearing: Motion	1	Event held as scheduled
3	08/12/2002	14:00	Conference: Pre-Trial	1	Event held as scheduled
4	09/30/2002	14:00	Conference: Status Review	1	Event held as scheduled
5	11/06/2002	14:00	Hearing: Evidentiary-suppression	1	Event held as scheduled
6	02/05/2003	14:00	Hearing: Evidentiary-suppression	1	Event canceled not re-scheduled
7	03/03/2003	09:00	Hearing: Misc Matters	1	Event held as scheduled
8	03/04/2003	09:00	Hearing: Misc Matters	1	Event held as scheduled
9	03/06/2003	09:00	Hearing: Misc Matters	1	Event held as scheduled
10	03/07/2003	09:00	Hearing: Misc Matters	1	Event held as scheduled

Full Docket Entries

240 Docket Entries for Docket: BECR2002-00028

Entry Date:	Paper No:	Docket Entry:
02/14/2002	1	Indictment returned
02/15/2002	2	Habeas corpus for Deft at Berkshire House of Correction (Pittsfield)
02/15/2002	3	Commonwealth files Petition For Writ Of Habeus Corpus Ad Defendum
02/20/2002	4	Committee for Public Counsel Services appointed Jill M Sheldon for the defendant, filed.
02/20/2002	4	the defendant, filed.
02/20/2002	5	Appearance of Deft's Atty: Jill M Sheldon for the defendant, filed.
02/20/2002		RE Offense 1:Plea of not guilty -Defendant ordered to recognize in
02/20/2002		the sum of \$250,000.00 cash or surety, PTC date of 3/20/2002 (Ford,
02/20/2002		J). Mittimus issued in hand to deputy sheriff.
02/20/2002		RE Offense 2:Plea of not guilty
02/20/2002		RE Offense 3:Plea of not guilty
02/20/2002		RE Offense 4:Plea of not guilty
02/20/2002		RE Offense 5:Plea of not guilty
02/20/2002		RE Offense 6:Plea of not guilty
02/20/2002		RE Offense 7:Plea of not guilty
02/20/2002		RE Offense 8:Plea of not guilty
02/20/2002		RE Offense 9:Plea of not guilty
02/20/2002	6	Defendant's Motion for Copy of Search Warrant and Return, filed.
02/20/2002		Motion (P#6) allowed (Daniel A. Ford, Justice). Copies mailed

02/20/2002		February 21, 2002
02/21/2002	7	Mittimus for failure to recognize returned and filed
02/25/2002	8	Motion by Commonwealth: for Reciprocal Discovery, filed.
02/25/2002	9	Commonwealth files Certificate of Discovery, filed.
03/07/2002	10	Habe: returned w/service, filed.
05/06/2002	11	Withdrawal of appearance filed by Jill A. Sheldon, filed.
05/06/2002	12	Appearance of Deft's Atty: Bonnie G. Allen, filed.
05/06/2002		Notice of Assignment of Counsel Bonnie G. Allen, filed.
05/21/2002		Motion (P#11) Given that successor counsel has filed her appearance,
05/21/2002		allowed (Thomas J. Curley, Jr., Justice). Copies mailed to counsel.
06/27/2002	13	Commonwealths Notice of Intent to Seek Forfeiture, filed.
07/19/2002	14	Motion For Reconsideration Of Bail (Bail set without prejudice by
07/19/2002	14	Ford, J. on February 20, 2002 be reconsidered)
07/19/2002	15	Commonwealth files petition for Writ of Habeas Corpus to allow
07/19/2002	15	Michael Eller to be brought from the Berkshire House of Correction to
07/19/2002	15	the Berkshire Superior Court on August 12, 2002 @ 2:00PM
08/12/2002	16	Pre-trial conference report filed
08/12/2002		After Reconsideration, bail to remain set at \$250,000.00 cash or
08/12/2002		surety, (Ford, J).
09/19/2002		Habeas corpus for Deft at Berkshire County House of Correction issued
09/19/2002		in hand to deputy sheriff.
09/27/2002	17	Defendant's motion to suppress, filed.
09/27/2002	18	Motion by Deft: for Criminal and Juvenile Records of Potential
09/27/2002	18	Witnesses, filed.
09/27/2002	19	Motion by Deft: for Discovery, filed.
09/27/2002	20	Motion by Deft: for Police Reports, Logs and Related Documents, filed.
09/27/2002	21	Motion by Deft: for Disclosure of Surveillance Information, filed.
09/27/2002	22	Motion by Deft: to Suppress Evidence with Affidavit of Counsel, filed.
09/27/2002	23	Deft files Memorandum in Support of Motion to Suppress Evidence,
09/27/2002	23	filed.
09/30/2002	25	Defendant's ex parte motion for funds for investigator and affidavit
09/30/2002	25	(impounded) filed and allowed, (Curley, J.).
09/30/2002		Defendant's motion for criminal and juvenile records of potential
09/30/2002		witnesses allowed, (Curley, J.).
09/30/2002		Defendant's motion for discovery-see record, (Curley, J.).
09/30/2002		Defendant's motion for police reports, logs and related documents-#1
09/30/2002		through 5 allowed by agreement; 6 & 7-allowed as to transactions to
09/30/2002		be used against the defendant at trial in any way; 8-denied;
09/30/2002		9-allowed without objection, (Curley, J.).
09/30/2002		Defendant's motion for disclosure of surveillance information
09/30/2002		allowed, (Curley, J.).

10/03/2002	24	Habe: returned w/service
10/08/2002		Notice of hearing sent on defendant's motion to suppress statements
10/08/2002		and defendant's motion to suppress evidence for Wednesday, November
10/08/2002		6, 2002 at 2:00 p.m. to counsel.
10/31/2002	26	Defendant's Motion for Indigent Summons Pursuant to Mass. R. Crim. P.
10/31/2002	26	17(b), filed.
10/31/2002	27	Defendant's Motion for Indigent Summons pursuant to Mass. R. Crim. P.
10/31/2002	27	17(b), filed.
10/31/2002	28	Defendant's Motion for Protective Order from trial November 11, 2002
10/31/2002	28	through November 29, 2002, with certificate of service, filed.
11/01/2002		Motion (P#26) allowed (Thomas J. Curley, Jr, Justice). Copies mailed
11/01/2002		November 01, 2002. Barbara Allen notified by telephone on November 1,
11/01/2002		2002; also faxed to Attorney Allen.
11/01/2002		Motion (P#27) allowed (Thomas J. Curley, Jr., Justice). Copies mailed
11/01/2002		November 01, 2002. Barbara Allen Esq. notified by telephone on
11/01/2002		November 1, 2002; also faxed to Attorney Allen on November 1, 2002.
11/04/2002	29	Motion by Deft: to Remove Case from November Trial List with
11/04/2002	29	Certificate of Service, filed.
11/06/2002		Hearing held on defendant's motion to suppress evidence-under
11/06/2002		advisement, (Ford, J.).
11/06/2002	30	List of exhibits on motion to suppress filed.
11/06/2002		Defendant's motion to suppress statement-except for the issue of
11/06/2002		voluntariness, which may be raised at trial, this motion is waived in
11/06/2002		open court in the presence of the defendant, (Ford, J.).
11/13/2002	32	Commonwealth's memorandum in opposition to defendant's motion to
11/13/2002	32	suppress filed.
11/25/2002	31	Memorandum of decision on defendant's motion to suppress evidence
11/25/2002	31	entered- motion DENIED, (Ford, J.). Copies to counsel on 11/27/02.
12/12/2002	33	Defendant's Notice of Appeal from decision of the Court entered on
12/12/2002	33	November 25, 2002 denying Motion to Suppress, filed.
12/23/2002	34	Defendant's Motion for protective order from trial January 6, 2003
12/23/2002	34	through January 31, 2003, with certificate of service, filed.
12/23/2002	35	Defendant's Motion to reconsider ruling on Motion to Suppress
12/23/2002	35	Evidence Seized at Defendant's Recording Studio, filed.
12/23/2002	36	Affidavit of counsel in support of Motion to reconsider ruling on
12/23/2002	36	Motion to suppress evidence seized at defendant's recording studio,
12/23/2002	36	filed.
12/23/2002	37	Defendant's Motion to Suppress Fruits of Warrantless Entry and search
12/23/2002	37	of Defendant's Workplace, filed.
12/23/2002	38	Affidavit of the defendant, filed.
12/23/2002	39	ORDER for Transcript, (Motion to suppress hearing of 11/6/02 before

12/23/2002	39	(Ford, J)), entered. Certified copy mailed to counsel; Certified copy
12/23/2002	39	in hand to Stenographer, Harriet Sears.
01/15/2003		Case on for status today-defendant not present; a hearing will be
01/15/2003		held on defendant's motion to suppress evidence on Wednesday,
01/15/2003		February 5, 2003 at 2:00 P.M.
01/23/2003	40	Notice of Docket Entry from the Supreme Judicial Court with Order:
01/23/2003	40	Interlocutory appeal DENIED (Cordy, J.), filed.
02/07/2003		Transcript of testimony received Vol. #1 (Motion to Suppress Evidence
02/07/2003		hearing held 11/6/02) from court reporter, Sears, Harriet E.
02/18/2003	43	Affidavit of Michael Eller filed.
02/19/2003		Hearing held before (Ford, J.), on defendant's motion to reconsider
02/19/2003		ruling on motion to suppress evidence. under advisement.
02/20/2003	41	Commonwealths Motion for protective order from trial during the
02/20/2003	41	period of March 14 through March 23, 2003, with certificate of
02/20/2003	41	service, filed.
02/24/2003	42	Defendant's motion to reconsider ruling on defendant's motion to
02/24/2003	42	suppress and memorandum
02/24/2003	44	Commonwealth's supplemental memorandum in opposition to the
02/24/2003	44	defendant's motion to suppress evidence filed.
02/25/2003	45	Memorandum of decision on defendant's motion to reconsider ruling on
02/25/2003	45	motion to suppress evidence entered, (Ford,J.). Copies certified to
02/25/2003	45	counsel.
02/25/2003		Defendant's motion to reconsider ruling on motion to suppress
02/25/2003		evidence seized at defendant's recording studio (paper #35) denied,
02/25/2003		see Memorandum of Decision entered, (Ford,J.).
02/25/2003		Defendant's motion to suppress fruits of warrantless entry and search
02/25/2003		of defendant's workplace (paper #37)-no action necessary-see
02/25/2003		Memorandum of Decision on defendant's motion for reconsideration,
02/25/2003		(Ford,J.).
02/25/2003		Defendant's motion to reconsider ruling on defendant's motion to
02/25/2003		suppress (paper #42) denied-see Memorandum of Decision on defendant's
02/25/2003		first motion for reconsideration, (Ford,J.).
03/03/2003	46	Defendant's motion for appointment of counsel filed and allowed,
03/03/2003	46	(Curley, J.).
03/03/2003	47	Notice of assignment of counsel filed.
03/03/2003		Defendant sworn. Colloquy held regarding defendant's waiver of trial
03/03/2003		by jury before (Curley, J.).
03/03/2003	48	Waiver of trial by jury filed and approved (Curley, J.).
03/03/2003	49	Defendant's motion to sequester witnesses filed and allowd, (Curley,
03/03/2003	49	J.).
03/03/2003	50	Defendant's motion in limine to exclude prior and subsequent bad acts

03/03/2003	50	and statements of the defendant filed. After hearing-Peter Cardinal
03/03/2003	50	testimony in; James Cieslik testimony out; Therese Cardinal testimony
03/03/2003	50	in if based upon her observations (Curley, J.).
03/03/2003	51	Defendant's list of potential witnesses filed.
03/03/2003	52	Commonwealth's list of potential witnesses filed.
03/03/2003		As to indictment no. 2002-028-6-Comm. is proceeding as alleged
03/03/2003		Unlawful possession of a firearm, Ch. 269, sec. 10(h).
03/03/2003		Jury waived trial commenced before (Curley, J.). Comm. makes opening.
03/04/2003		Jury waived trial continued before (Curley, J.). (trial did not go
03/04/2003		forward on 3/5/03)
03/06/2003		Jury waived trial continued before (Curley, J.). Commonwealth rests.
03/06/2003	53	Defendant's motion for required finding of not guilty filed. Allowed
03/06/2003	53	as to "large capacity" aspect of count 6, otherwise denied, (Curley,
03/06/2003	53	J.).
03/06/2003	54	Memorandum of law in support of motion for required finding of not
03/06/2003	54	guilty as to possession with intent to distribute cocaine in the
03/06/2003	54	studio filed.
03/06/2003		Defendant rests.
03/06/2003		Final arguments heard.
03/06/2003	55	Finding of guilty as to no. 2002-028-1 entered, (Curley, J.). Bail
03/06/2003	55	revoked.
03/06/2003	56	Finding of guilty of Possession of Cocaine with intent to distribute
03/06/2003	56	as to no. 2002-028-2 entered, (Curley, J.).
03/06/2003	57	Finding of guilty of Possession of Heroin with intent to distribute
03/06/2003	57	as to no. 2002-028-3 entered, (Curley, J.).
03/06/2003	58	Finding of guilty of Illegal Possession of a firearm Ch. 269, sec.
03/06/2003	58	10(h) as to no. 2002-028-4 entered, (Curley, J.).
03/06/2003	59	Finding of guilty as to no. 2002-028-5 entered, (Curley,J.).
03/06/2003	60	Finding of guilty of Unlawful possession of a firearm Ch. 269, sec.
03/06/2003	60	10(h) as to no. 2002-028-6 entered, (Curley,J.).
03/06/2003	61	Finding of guilty as to no. 2002-028-7 entered, (Curley, J.).
03/06/2003	62	Finding of guilty of Distribution of Cocaine as to no. 2002-028-8
03/06/2003	62	entered, (Curley,J.).
03/06/2003	63	Finding of not guilty of Possession of Cocaine with intent to
03/06/2003	63	distribute as to no. 2002-028-9 entered, (Curley, J.).
03/06/2003	64	List of exhibits filed.
03/06/2003		RE Offense 1:Guilty finding
03/06/2003		RE Offense 2:Guilty finding
03/06/2003		RE Offense 3:Guilty finding
03/06/2003		RE Offense 4:Guilty finding
03/06/2003		RE Offense 5:Guilty finding

03/06/2003		RE Offense 6:Guilty finding
03/06/2003		RE Offense 7:Guilty finding
03/06/2003		RE Offense 8:Guilty finding
03/06/2003		RE Offense 9:Not guilty finding
03/07/2003		Defendant arraigned as to second offense portions of nos. 2002-028-2,
03/07/2003		-3, -4 and -8 and entered not guilty pleas.
03/07/2003		Defendant retracts and pleads guilty to second offense portions of
03/07/2003		nos. 2002-028-2, -3, -4 and -8; pleas accepted, (Curley, J.).
03/07/2003		Sentences imposed: As to no. 2002-028-4: 15 to 20 years, M.C.I. Cedar
03/07/2003		Junction with credit of 410 days, deft. assessed \$90.00 v/w fee and
03/07/2003		\$150.00 drug assessment fee; as to nos. 2002-028-1, -2, -3 & -8: 7
03/07/2003		1/2 to 10 years M.C.I. Cedar Junction with credit of 410 days to be
03/07/2003		served concurrently with the sentence imposed on no. 2002-028-4; as
03/07/2003		to no. 2002-028-5: 7 1/2 to 10 years M.C.I. Cedar Junction, with
03/07/2003		credit of 410 days to be served from and after the sentence on no.
03/07/2003		2002-028-1 and to be served concurrently with the sentence on no.
03/07/2003		2002-028-4; as to nos. 2002-028-6 & -7: 2 years House of Correction
03/07/2003		with credit of 410 days to be served concurrently with the sentence
03/07/2003		imposed on no. 2002-028-4 (Curley, J.). Deft. advised of appellate
03/07/2003		rights.
03/07/2003		Mittimus issued on indictment #02-028-4 in hand to deputy sheriff.
03/12/2003	65	Defendant's Notice of Appeal from the verdict, filed. Certified copy
03/12/2003	65	to counsel.
03/12/2003	66	Defendant's Counsel, Barbara Allen's Motion to withdraw appearance,
03/12/2003	66	filed.
03/12/2003	67	Defendant's Counsels Motion to Appoint Appellate Counsel, filed.
03/17/2003		Letter with five (5) original mittimuses issued by mail to MCI Cedar
03/17/2003		Junction, Attn: Records Department.
03/17/2003		Abstract sent to RMV
03/18/2003		Letter with partial completed Notice of Assignment of Counsel Form
03/18/2003		for purpose of having counsel assigned for appeal mailed to Denise
03/18/2003		Simonini @ CPCS in Boston.
03/18/2003	68	ORDER for Transcript, entered. (Motion to Suppress hearing on 2/19/03
03/18/2003	68	and Trial/Sentencing). Certified copy to counsel. Certified copy to
03/18/2003	68	Harriet Sears, Stenographer.
03/18/2003		Motion (P#67) allowed (Thomas J. Curley, Jr., Justice). Copies mailed
03/18/2003		March 18, 2003
03/24/2003	69	Appointment of Counsel Stewart Graham for Appeal purposes, filed.
06/12/2003		General correspondence regarding Michael Eller mailed to M.C.I.
06/12/2003		Concord on 6/12/03.
08/12/2003	70	Mittimus returned with service as to No. 02-028-4, filed.

08/12/2003	71	Mittimus not recog. returned with service, filed.
09/19/2003	72	Appearance of Deft's Atty: Stewart T. Graham, Jr., filed.
10/27/2003		Correspondance from Attorney Stewart T. Graham, Jr. requesting trial
10/27/2003		transcript copy of evidentiary hearing on motion to suppress held on
10/27/2003		November 6, 2002, received.
11/06/2003	73	Mittimus as to No. 02-028-1 returned with service, filed.
11/06/2003	74	Mittimus as to No. 02-028-2 returned with service, filed.
11/06/2003	75	Mittimus as to No. 02-028-3 returned with service, filed.
11/06/2003	76	Mittimus as to No. 02-028-5 returned with service, filed.
11/06/2003	77	Mittimus as to No. 02-028-8 returned with service, filed.
04/07/2005		Transcript of testimony received Vol. #1 (2/19/03-Motion to
04/07/2005		Suppress); Vols. 1 thru 4 (3/3, 3/4, 3/6 and 3/7/03-Trial
04/07/2005		Transcripts) from court reporter, Sears, Harriet E.
04/27/2005	78	Notice of assembly of record; mailed to Appeals Court per Rule 9(d)
05/05/2005	79	General correspondence regarding Notice of entry notice this case was
05/05/2005	79	entered in the appeals court.

Charges

9 Charges for Docket: BECR2002-00028

No.	Charge Description:	Indictment:	Status:
1	Violation sec 10 by person prev convicted w/violent crime/drug off		Guilty finding
2	Dang weapon, possess lg cap weapon/feeding device w/o valid licns		Guilty finding
3	Class A substnc, distrib/manufac, 2nd/subsqnt offense		Guilty finding
4	Traffic in controlled substance, 14-27g		Guilty finding
5	Class B Substance, distrib/manufact 2nd/subsqnt offense		Guilty finding
6	Dang weapon, possess/transfr gun/ammo, no ID card		Guilty finding
7	Class B Substance, distrib/manufact 2nd/subsqnt offense		Guilty finding
8	Class B Substance, distrib/manufact 2nd/subsqnt offense		Not guilty find
9	Felony, firearm		Guilty finding

EXHIBIT B

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF BERKSHIRE
THE SUPERIOR COURT

NOTICE OF THE ASSEMBLY OF THE RECORD
APPEAL COVER SHEET

Docket No: CR #02-028

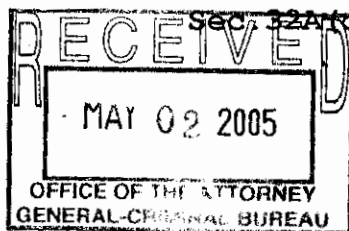
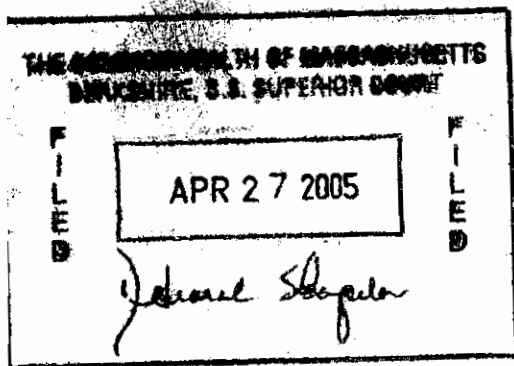
Case Name: COMMONWEALTH VS. MICHAEL ELLER

APPEARANCES

Plaintiff(s) Attorney
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Berkshire County District
Attorney's Office
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Defendant(s) Attorney
Address and Telephone
Stewart T. Graham, Jr., Esq.
Graham & Graham
39 Burleigh Road
Hampden, MA 01036
Tel. (413) 781-4342

Nature of the Case: Indictment #02-028-1 charging: Trafficking in Cocaine (Ch.94C,sec.32E(b)(1)); Indictment #02-028-2 charging: Possession of Cocaine with Intent to Distribute-Second Offense (Ch.94C,sec.32A(d)); Indictment #02-028-3 charging: Possession of Heroin with Intent to Distribute-Second Offense (Ch.94C,sec.32(b)); Indictment #02-028-4 charging: Violation of General Laws, Chapter 269, Section 10 by a Person Having Been Previously Convicted of Three Violent Crimes or Serious Drug Offenses Ch.269,sec.10G(c)); Indictment #02-028-5 charging: Possession of a Firearm in the Commission of a Felony (Ch.265,sec.18B); Indictment #02-028-6 charging: Unlawful Possession of a Large Capacity Firearm (Ch.269,sec.10m); Indictment #02-028-7 charging: Illegal Possession of Ammunition Without a FID Card (Ch.269,sec.10(h)); Indictment #02-028-8 charging: Distribution of Cocaine-Second Offense (Ch.94C,sec.32A(d)); Indictment #02-028-9 charging: Possession of Cocaine with Intent to Distribute-Second Offense (Ch.94C,sec.32A(d)).



A True Copy

Attest

Trial Court Entry Date: 02/14/02

Date of Claim of Appeal: 03/12/03

Appeal by: Defendant

Date Transcript Ordered: 12/23/02 - Motion to Suppress on 11/6/02
03/18/03 - Motion to Suppress on 2/19/03
03/18/03 - Trial/Sentencing

Transcript prepared: yes - no

Number of volumes: Motion to Suppress Evidence - 1 Volume
Motion to Suppress Evidence - 1 Volume
Trial/Sentencing - 4 Volumes

Decision: Guilty Finding as to Indictment Nos. 02-028-1 thru 8.
Not Guilty Finding as to Indictment No. 02-028-9.
Defendant plead Guilty as to second offense portions of
Indictment #'s: 02-028-2, 3, 4 and 8

Date: 04/27/04

Effective date: 7/1/04

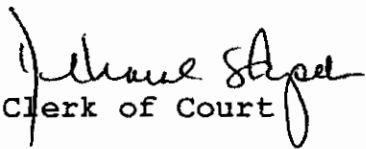

Clerk of Court

EXHIBIT C

Supreme Judicial Court and Appeals Court of Massachusetts

Public Case Information

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APPEALS COURT

Panel Cases

Case Docket

COMMONWEALTH vs. MICHAEL ELLER
2005-P-0632

CASE HEADER

Case Status	No briefs yet	Status Date	05/02/2005
Nature	CRIMINAL	Entry Date	05/02/2005
Sub-Nature	csa traff cls b Cocaine, etal	SJ Number	
Appellant	Defendant	Case Type	Criminal
Brief Status	Awaiting blue brief	Brief Due	06/13/2005
Panel		Argued/Submitted	
Citation		Decision Date	
Lower Court	Berkshire Superior Court	TC Number	
Lower Ct Judge	Thomas J. Curley, Jr., J.	TC Entry Date	02/14/2002

INVOLVED PARTY

Commonwealth
Plaintiff/Appellee
Awaiting red brief

Michael Eller
Defendant/Appellant
Awaiting blue brief

ATTORNEY APPEARANCE

Joseph A. Pieropan, A.D.A.

Stewart T. Graham, Jr., Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
05/02/2005		Transcripts received: vols: 6; sets: 2 in Clerk's envelope.
05/02/2005	#1	Entered.
05/02/2005		Notice of entry sent.

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As of 05/04/2005 01:07

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